Supreme Court, U.S.
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No. 94-1968

In The

Supreme Court of the United States

October Term, 1995

J. DON ADAMS, et al.,

Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether review of this non-final judgment is premature because the evidentiary hearing ordered by the Court of Appeals on the virtual representation issue may moot Petitioners' jurisdictional challenge.

II.

Whether review of this non-final judgment is premature because the evidentiary hearing ordered by the Court of Appeals on the virtual representation issue may yield additional facts relevant to jurisdiction.

III.

Whether review should be denied because the Court of Appeals' opinion does not conflict with holdings of this Court or any Circuit Court of Appeals and does not raise issues of general public importance.

IV.

Whether review of the District Court's order regulating attorneys' contacts with provisional settlement class members should be denied because the Order became moot when the settlement failed.

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STATEMENT OF THE CASE

1. INTRODUCTION

This lawsuit relates to an investment in the Registry Hotel, a resort hotel in Naples, Florida, by Petitioners and other investors ("Unit Owners"). Merrill Lynch was sales agent for the offering. In August, 1989, a class action lawsuit was filed on behalf of all Unit Owners against the developer, Shelter Seagate Corporation ("SSG"), Merrill Lynch, the lender, architect, contractor, and others involved with constructing the Hotel for alleged breaches of contract, statutory and common law fraud and other torts. The District Court dismissed all claims against Merrill Lynch and awarded Unit Owners (including Petitioners) $6.7 million in damages against SSG and its principals.

The central, ongoing dispute between Merrill Lynch and Petitioners is whether the doctrine of "virtual representation" binds Petitioners to the District Court's judgments. The Petition does not, however, address virtual representation because the courts below have not finally determined whether the doctrine applies. The Court of Appeals remanded the case for an evidentiary hearing on that issue, but the hearing has not taken place because of this Petition.[1] If, after the hearing, Petitioners are bound, they will be enjoined from relitigating their claims against Merrill Lynch in Florida state court and in arbitration proceedings ("Florida Action").

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[1] Petitioners blocked that hearing by obtaining a stay of the mandate from the Court of Appeals.

Petitioners seek to prevent the evidentiary hearing by challenging the District Court's jurisdiction over them. The District Court held that Petitioners and the other class members consented to personal jurisdiction by litigating breach of contract claims against SSG as members of a certified class ("the Certified Contract Class") in this lawsuit prior to Merrill Lynch's dismissal:

> [T]he Florida plaintiffs cannot claim that this court has personal jurisdiction over them in order to collect the $6.7 million judgment from SSG [the Hotel developer], of which they are recipients as members of the plaintiff contract class, and then turn around and say that this court does not have personal jurisdiction over them with respect to the other issues in the case.

Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 809 F. Supp. 1259, 1270 (E.D. Mich. 1993). The Court of Appeals affirmed this holding without discussion. *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d 1054 (6th Cir. 1995).

This Court should not review this non-final judgment on a jurisdictional issue. Review is premature – the District Court will hold an evidentiary hearing on virtual representation. If the District Court finds in Petitioners' favor, Petitioners will be free to pursue the Florida Action and will no longer object to jurisdiction. The jurisdictional ruling, moreover, does not conflict with decisions of this or other courts and is not of general public importance.

Petitioners also seek review of the District Court's March 24, 1992 Order (the "Settlement Supervision Order") concerning the rights and responsibilities of class

counsel in providing information to Unit Owners concerning a proposed settlement. That settlement failed shortly after entry of the Settlement Supervision Order; the Order lapsed with it. The Court of Appeals held that Petitioners' objections to the Settlement Supervision Order were mooted by the settlement's failure. This Court should not review the Settlement Supervision Order because the Petition did not challenge the holding by the Court of Appeals that issues relating to the Settlement Supervision Order were moot. In any event, the Court of Appeals' holding was correct.

2. PETITIONERS' INITIAL INVOLVEMENT IN THIS LAWSUIT

Petitioners are not typical absent putative class members, whose sole knowledge of and involvement in the suit is the receipt of a class certification notice. Instead, all of the Unit Owners, including Petitioners, have had a sustained, organized involvement in this lawsuit since before it was filed through a formal organization composed of the Unit Owners – the Association of Unit Owners of the Registry Hotel ("AUO"). The AUO is a Florida non-profit corporation which is the equivalent of a condominium homeowners' association. The Unit Owners are the members of the AUO and elect the AUO Board. The AUO is charged by statute with a fiduciary duty to represent the interests of the Unit Owners. Fla. Stat. § 718.111(1)(a).

Beginning in October, 1988, when the AUO undertook to investigate and resolve its members' concerns over the Hotel's financial performance, the AUO has

initiated, financed, supported, directed, and monitored this lawsuit.

The AUO selected and retained Class Counsel. The AUO interviewed eight law firms and selected Elwood Simon (one of the present Class Counsel) "to investigate our situation; if there are potential damages, to negotiate, *and if the [AUO] Board decides*, ultimately to litigate the damages." (AUO Board Minutes, October 17, 1988, p. 1, emphasis added.)[2]

The AUO financed Class Counsel's Investigation. The AUO contracted with Class Counsel to represent Unit Owners for $250,000 plus a 25% contingency fee. The AUO paid the $250,000 – it budgeted $250,000 plus expenses for Class Counsel's investigation and authorized payment of the fees at $50,000 per month "out of operations."

Class Counsel reported to the AUO Board. Class Counsel periodically reported the progress of the investigation to the AUO orally and in writing.

The AUO decided to file this action. Class Counsel advised the AUO Board that although the AUO could pursue construction claims in its own name, claims related to the sale of securities and compliance with the terms of the offering could only be pursued in the names of Unit Owners.

The AUO accordingly decided on a three-front offensive: 1) a class action lawsuit would be filed on behalf of

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[2] These and the other AUO minutes and correspondence cited are in the District Court record. The authenticity of these documents was not disputed by Class Counsel or Petitioners.

the Unit Owners using the AUO's counsel and the AUO's investigation; 2) Unit Owners would withhold their mortgage payments; and 3) the AUO would pursue construction claims. This strategy was described at the 1989 AUO Annual Members' Meeting by Arthur Zaske, AUO Board President, who also told Unit Owners that if "negotiation falls through, then *we as owners would go to class action litigation.*" (emphasis added). The AUO President then wrote to each Unit Owner recommending the withholding of mortgage payments and asking all Unit Owners to contribute additional money to fund the class action litigation. He advised Unit Owners to "open direct lines of communication between you and the attorneys. The lead attorney is Elwood Simon. . . . "

The AUO implemented its plan. The AUO proceeded as planned. It first attempted to negotiate a settlement with the potential defendants on behalf of the Unit Owners. In August 1989, when negotiations failed, this lawsuit was filed, based upon the investigation initiated and funded by the AUO.[3]

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[3] The Complaint's preamble recited:

> Plaintiffs, by their attorneys, for their Class Action Complaint, allege upon personal knowledge and as to all other matters upon information and belief based upon, *inter alia, the investigation made by and through their attorneys* which investigation included, among other things, a review of offering documents, promissory notes, mortgages and other closing documents, accounting work papers, other litigation files, interviews with parties participant, and public and private records.

(Emphasis added).

The May 22, 1989 minutes of the AUO Annual Meeting confirms that these items constituted the AUO's investigation.

The AUO executed the second prong of its plan, persuading a substantial number of Unit Owners (including 59 of the Petitioners) to withhold mortgage payments on their Units. The AUO recommended a Naples attorney, Thomas Grady, to defend judicial foreclosure proceedings brought by the lender. Mr. Grady thus came to represent approximately 100 Unit Owners, including the Petitioners, several class representatives and the president and other AUO officers and Board members. (Mr. Grady is counsel for the Petitioners, as well as for the Florida Plaintiffs in the courts below and the Florida Action).

Mr. Grady's March 19, 1992 letter to the District Court acknowledges the close and direct connections between the Florida foreclosure proceedings, this lawsuit, and the AUO:

> [T]he number of Registry clients represented by this firm regularly increased. This was attributable in part to what I believe was a recommendation by Arthur E. Zaske [President of the AUO] to Unit Owners to discontinue paying their purported mortgage obligations to the lender.[4]
>
> [T]here was active encouragement [from the AUO] behind the scenes to cause Unit Owners to cease making these payments. . . . When Mr. Simon filed the class action lawsuit in August, 1989, that had the effect, which I believe was

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[4] Mr. Zaske ceased making mortgage payments himself . . . upon being sued in foreclosure by Trustbank, Mr. Simon requested, and I agreed that we represent Mr. Zaske as a professional courtesy in the defense of lenders' claims. . . . [footnote in original].

> anticipated, of encouraging additional Unit Owners to cease making mortgage payments. . . .

The AUO made sure that both prongs of their plan proceeded smoothly. Mr. Grady and Mr. Simon, as the AUO-designated attorneys in the foreclosure proceedings and this lawsuit, cooperated closely and coordinated strategy on both fronts. For example, Mr. Simon acted as Mr. Grady's co-counsel in a number of the foreclosure actions in order to facilitate coordination. Mr. Grady acknowledged this cooperation and collaboration in his letter to the District Court:

> I had always considered Mr. Simon as being *on the same team*, so to speak, as I was. That is not to say that we never disagreed regarding strategy but *I believe our objectives had never differed.*
>
> * * *
>
> Mr. Simon and I would consult from time to time on issues that were important to both of us in related litigation. . . . In consultation with Mr. Simon, I was successful in obtaining [rulings in the foreclosure proceedings, which] . . . I believe . . . furthered the objectives of the class plaintiffs . . .

(Emphasis added). Mr. Grady likewise acknowledged in open court that he and Mr. Simon "worked very closely together and . . . traded information on a very regular basis regarding the Registry Hotel project generally."[5]

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[5] By contrast, Mr. Grady now represents to this Court that his relationship with class counsel was "distant, but harmonious." (Cert. Pet., p. 7).

3. PETITIONERS' INVOLVEMENT THROUGH THE CERTIFIED CONTRACT CLASS

The District Court used its powers under Fed. R. Civ. P. 16 and Fed. R. Civ. P. 42 to efficiently manage the case. After recognizing that the "fraud" claims were based on breaches of contract, the District Court ordered an expedited, bifurcated trial on the breach of contract claims against SSG and its principals.

The District Court certified the class of Unit Owners for purposes of the contract claims *Each Petitioner chose to remain in the Class* and thereby participated in the bench trial on those claims.

At the start of the trial, the District Court entered summary judgment in favor of the Class on one claim, concerning the leasing of certain furniture, fixtures and equipment ("FF&E"), reserving a ruling on the amount of damages. The other claim, for the allegedly premature closing of the Hotel out of construction escrow, was tried by the District Court. It found that SSG breached the contract regarding the closing but that the breach was not material. After the settlement discussed below broke down, the District Court heard testimony on the amount of damages on the FF&E claim and awarded the Class, including Petitioners, a $6.7 million judgment.

4. THE PROVISIONAL SETTLEMENT CLASS

In February 1992, following the SSG trial but before the District Court's ruling, the parties reached a tentative

settlement. The District Court certified a provisional settlement class and approved the notice, which was sent to all Unit Owners. Some Petitioners opted out of the settlement class. Many Petitioners did not and became members of the provisional settlement class.[6] The provisional settlement class was dissolved when the settlement failed because of an excessive number of opt outs.

5. THE DISPOSITION OF THE NON-CERTIFIED CLAIMS

After the settlement failed, the District Court resolved the remaining claims on motion.[7] On August 7, 1992, the District Court dismissed all claims against Merrill Lynch, granting summary judgment on some claims and dismissing others on the pleadings.

6. THE FLORIDA ACTION

After the District Court's final ruling, Petitioners and other Grady clients ("Florida Plaintiffs") served Merrill Lynch with a Florida lawsuit based on the same claims dismissed by the District Court. The Florida Plaintiffs

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[6] Petitioners incorrectly assert that all of them either opted out or affirmatively reserved their right to object.

[7] The District Court had dismissed certain of the claims on November 20, 1990. That ruling was incorporated in the August 7, 1992 opinion.

also started a simultaneous arbitration proceeding against Merrill Lynch before the National Association of Securities Dealers.

Merrill Lynch immediately moved in the District Court to enjoin the Florida Actions on grounds of *res judicata* and collateral estoppel. Merrill Lynch argued that: 1) the Florida Plaintiffs, as members of the certified class, were directly bound as parties to the judgments and findings in the SSG trial; and 2) the Florida Plaintiffs were bound by the judgments and rulings on the non-certified claims under principles of privity, based on the Unit Owners/AUO's pervasive involvement in the case.[8]

On November 24, 1992, the District Court enjoined the Florida Plaintiffs from pursuing the claims actually decided in this lawsuit (the "Injunction"). It did not enjoin two counts (violation of the registration requirements of the Florida Securities Act and unsuitability). The District Court said these two claims were barred, but that it lacked authority to enjoin them because of the Anti-Injunction Act, 28 U.S.C. § 2283. It requested the Florida court to dismiss those claims.

The District Court rejected the Florida Plaintiffs' claim that it lacked personal jurisdiction over them:

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[8] Petitioners misstate Merrill Lynch's position when they assert that "Merrill Lynch asserted that Petitioners, as putative class members . . . , were bound by the district court's summary dismissal of the *Becherer* Plaintiffs' claims against Merrill Lynch." (Cert. Pet. at 3). Merrill Lynch has never taken the position that Petitioners were bound because they were members of an uncertified class.

> Florida plaintiffs also argue that this court does not have personal jurisdiction over them because no class was ever certified for purposes of the Merrill Lynch fraud claims. . . . Counsel for Florida plaintiffs confuses the concept of personal jurisdiction with the *res judicata* issue. I have personal jurisdiction over the Florida plaintiffs because they are parties to the case before me through their representatives. They also are members of the class in the breach of contract trial which I conducted, and as such are bound by the results of that trial. For these reasons, I conclude that there is personal jurisdiction over them. As Merrill Lynch properly points out, the Florida plaintiffs cannot claim that this court has personal jurisdiction over them in order to collect the $ 6.7 million judgment from SSG, of which they are recipients as members of the plaintiff contract class, and then turn around and say that this court does not have personal jurisdiction over them with respect to the other issues in the case.

809 F. Supp. at 1270, footnote omitted.[9]

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[9] Petitioners incorrectly assert that "no one contests that the Petitioners lacked the requisite minimum contacts and that Petitioners did not consent to personal jurisdiction." (Cert. Pet., p. 15). Merrill Lynch has consistently argued that the court had jurisdiction based on consent and minimum contacts. To give but one example, in October 1992, Merrill Lynch submitted a "Supplemental Brief Regarding Jurisdiction Over The Florida Plaintiffs", the Argument section of which began:

> This Court continues to have jurisdiction over the Florida Plaintiffs because they are parties to the SSG class action [and] in privity with the class representatives and the AUO . . . In addition, . . . the Florida Plaintiffs have purposefully availed themselves of the

7. THE SETTLEMENT SUPERVISION ORDER

A schism developed between Mr. Grady and Mr. Simon over the proposed settlement. Mr. Simon was particularly concerned as to how Unit Owners who opted out of the settlement would be affected by the District Court's resolution of the non-Certified Contract Class claims in the event the proposed settlement failed, as reflected in his letter to Mr. Grady in February, 1992:

> I am greatly concerned that certain class members may harbor the unrealistic notion that, if they "opt out" of the Settlement, they will be able to relitigate the same factual issues, in what they believe to be a more receptive forum. . . .
>
> * * *
>
> [A]ny findings by the . . . court may be binding upon our mutually represented clients as a result of the doctrines of *res judicata*, collateral estoppel and issue preclusion. It is certainly the expressed opinion and intentions of counsel for the various defendants (including the Trustbank and Merrill Lynch defendants) . . . to interpose those defenses against any of the members of the (already certified) class who "opt out."[10]

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benefits of this forum. Under traditional due process analysis, it is not fundamentally unfair to subject them to the jurisdiction of this Court.

[10] The letter obviously rebuts Petitioners' disingenuous suggestion that Merrill Lynch opportunistically raised the preclusion issues only after obtaining judgment in its favor. As the letter notes, Merrill Lynch had taken the position that the District Court's rulings would bind all Unit Owners long before the District Court dismissed the claims against Merrill Lynch. It

Mr. Grady eventually demanded that Class Counsel stop communicating with Unit Owners who were also represented by Mr. Grady. This led to an Order to Show Cause regarding the rights and responsibilities of Class Counsel and Mr. Grady in connection with communications with Unit Owners. After further proceedings, on March 24, 1992, the District Court entered its Settlement Supervision Order, which provided that Class Counsel was entitled to communicate with all Unit Owners concerning the proposed Settlement, and directed all counsel to "impart only accurate, objective, balanced information regarding the settlement."

8. THE DECISION ON APPEAL

The holdings of the District Court were affirmed in part, reversed in part, and remanded for further proceedings. Three portions of the Court of Appeals' opinion relate to this Petition.

First, the Court of Appeals held that the District Court applied an incorrect legal standard in binding the Florida Plaintiffs to the non-class judgments because of privity. The Court concluded:

> [W]e must reverse the District Court's finding of privity and vacate its ensuing injunction. The briefs submitted by the parties on appeal, however, demonstrate a strong possibility that this case may yet be an appropriate one for the application of *res judicata* and collateral estoppel. Merrill Lynch contends that the Florida

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likewise rebuts the suggestion that Petitioners were somehow "blind-sided" by the preclusion issues.

> plaintiffs, through the Association of Unit Owners, authorized, financed, and controlled the investigation and prosecution of the Becherer plaintiffs' suit, including hiring an attorney and arranging to pay him a combination retainer and contingency fee.
>
> Because many of the facts discussed in the briefs are in dispute and because the issue was not fully developed and is essentially factual, we are unable to decide it here. Instead we remand the case to the District Court for factual findings under the narrower theory of virtual representation articulated above.

43 F.3d at 1071.

Second, it affirmed, without discussion, the District Court's ruling that it had personal jurisdiction over the Florida Plaintiffs.

Finally, it held that any issues relating to the Settlement Supervision Order were moot because the settlement had failed.

REASONS FOR DENYING THE WRIT

I. REVIEW IS PREMATURE BECAUSE PROCEEDINGS ON REMAND MAY MOOT OR RESOLVE PETITIONERS' ISSUES

The petition for certiorari should be denied because review is plainly premature. "[E]xcept in extraordinary cases, [certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed.2d 629 (1916). The lack of finality

"[is] a fact that of itself alone [is a] sufficient ground for the denial of the application." *Id. See also, Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R. Co.*, 389 U.S. 327, 328, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). This case illustrates the wisdom of this rule.

A. REVIEW IS PREMATURE BECAUSE THE COURT OF APPEALS REMANDED THIS CASE TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON VIRTUAL REPRESENTATION, THE RESULTS OF WHICH MAY MOOT THE ISSUES RAISED BY PETITIONERS

Review of this case is premature. Petitioners' fundamental objection is to the Injunction enjoining them from pursuing the Florida Action. Had the District Court denied Merrill Lynch's motion and ruled that Petitioners were not bound by the non-class judgments, Petitioners' jurisdictional concerns would have disappeared.

That may still happen. The Court of Appeals *vacated* the Injunction and ordered the District Court to hold an evidentiary hearing on the virtual representation issue. That hearing has not occurred and is being blocked by the Petition. If the District Court on remand determines that virtual representation does not exist, then Petitioners will not be bound and will be free to proceed with the Florida Actions. This Petition is therefore premature and should be denied.

B. REVIEW IS PREMATURE BECAUSE THE EVIDENTIARY HEARING MAY RESOLVE FACTUAL ISSUES PERTINENT TO JURISDICTION

Petitioners voluntarily submitted themselves to the jurisdiction of the District Court by becoming members of the Certified Contract Class. However, the District Court's evidentiary hearing may also develop facts which establish additional grounds for concluding that jurisdiction exists over Petitioners, because evidence establishing virtual representation also establishes jurisdiction.

As summarized by the Court of Appeals, Merrill Lynch has offered evidence "that the Florida plaintiffs, through the Association of Unit Owners, authorized, financed, and controlled the investigation and prosecution of the Becherer plaintiffs' suit, including hiring an attorney and arranging to pay him a combination retainer and contingency fee." This evidence shows that Petitioners "purposefully availed" themselves of the privilege of acting within the forum such that they would reasonably expect to be haled into court there, the touchstone of personal jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 580, 62 L.Ed.2d 490 (1980). The Court of Appeals ordered an evidentiary hearing, however, "[b]ecause many of the facts . . . are in dispute and because the issue was not fully developed and is essentially factual . . . " 43 F.3d at 1071 (emphasis added).

This Court will not ordinarily address unresolved factual issues. *Carden v. Arkoma Associates*, 494 U.S. 185, 197, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990). Review is therefore premature.

II. REVIEW IS INAPPROPRIATE BECAUSE THE COURT OF APPEALS' HOLDING DOES NOT CONFLICT WITH HOLDINGS OF THIS COURT OR ANY CIRCUIT COURT OF APPEALS AND DOES NOT RAISE ISSUES OF GENERAL PUBLIC IMPORTANCE

The Court of Appeals' ruling does not conflict with the holding of this Court or any Court of Appeals and does not raise any issue of general public importance. *See* Supreme Court Rule 10.1. *See also,* Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure,* § 4004, p. 508 (1977) ("General public importance of the issues, and the general need to secure uniformity of federal law, must be the basic touchstones [of granting review]").

A. THE HOLDING THAT PETITIONERS ARE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT DOES NOT CONFLICT WITH THE DECISION OF ANY COURT

The District Court held that jurisdiction exists because Petitioners voluntarily came before the Court as members of the Certified Contract Class. A discussion of this holding is strangely absent from the Petition. Instead, Petitioners cite general propositions that a judgment entered without personal jurisdiction violates due process, and that consent or minimum contacts are required for personal jurisdiction. The opinions below do not conflict with either of these propositions. Neither court below held that personal jurisdiction was unnecessary or that it could be established without consent or minimum contacts.

The District Court correctly held that it had personal jurisdiction over the Florida Plaintiffs because each of the Florida Plaintiffs voluntarily came before the Court as a member of the Certified Contract Class and obtained a $6.7 million judgment on those certified claims. Once Petitioners consented to the jurisdiction of the District Court for one purpose, they consented for all purposes in the litigation.

This Court and others recognize that a party asserting claims before a court is subject to that court's jurisdiction with respect to other claims before that court. The general principle is straightforward: "Once plaintiff has entered the jurisdiction for purposes of bringing an action, the cases indicate that he is also within the court's power for any claims that may be asserted against him." Wright, Miller and Kane, *Federal Practice and Procedure*, § 1424, p. 183 (1990). In *Adam v. Saenger*, 303 U.S. 59, 67-68, 58 S.Ct. 454, 82 L.Ed.2d 649 (1938), a Texas corporation's filing of a lawsuit in California gave the California court personal jurisdiction over a cross-claim against that corporation:

> The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, *there is nothing arbitrary or unreasonable in treating him as being there for all purposes* for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.

(Emphasis added). Similarly, in *General Contracting & Trading v. Interpole, Inc.*, 940 F.2d 20 (1st Cir. 1991), the

court held that a third-party defendant (Tratsco) submitted to the district court's jurisdiction when it brought a separate suit arising from the same transaction in the same court:

> Tratsco elected to avail itself of the benefits of the New Hampshire courts *as a plaintiff*, starting a suit against Interpole. By so doing, we think it is inevitable that Tratsco surrendered any jurisdictional objections to claims that Interpole wished to assert against it in consequence of the same transaction or arising out of the same nucleus of operative facts.

Id. at 23, emphasis in original. Indeed, a party initiating a suit consents to that court's jurisdiction even for claims that do *not* arise out of the same nucleus of operative facts. For example, a plaintiff is deemed to have consented to the forum court's jurisdiction for all counterclaims, including non-compulsory counterclaims. *Gutor International, A.G. v. Raymond Parker Co., Inc.*, 493 F.2d 938, 947 (1st Cir. 1974).

These cases are consistent with basic due process constraints on personal jurisdiction. Due process requires that a non-resident defendant possesses minimum contacts with the forum state such that the exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Due process is satisfied when a defendant "purposefully avails itself of the privilege of conducting activities within the forum state" such that it would reasonably expect to be haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Hanson v. Denckla*, 357 U.S.

235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Petitioners' pursuit of a lawsuit in the District Court is a very purposeful availment of the privilege of acting in that forum. It is neither unfair nor surprising for the District Court to resolve other matters relating to the subject matter or parties involved in the lawsuit.

Petitioners mistakenly emphasize that the Certified Contract Class was limited to certain claims against certain defendants and that they cannot be bound under Fed. R. Civ. P. 23 to any judgment on uncertified claims. (Cert. Pet. at 16). As the District Court recognized however, this argument "confuses the concept of personal jurisdiction with the *res judicata* issue." 809 F. Supp. at 1270. The lack of class certification on some claims means that the Florida Plaintiffs are not bound *under Rule 23*. It does not mean, however, that the District Court lacks personal jurisdiction over Petitioners to determine whether they are bound for other reasons such as *res judicata* and collateral estoppel. As the Court of Appeals held:

> While plaintiffs argue at length that the injunction was improper because putative class members cannot be bound absent notice and an opportunity to opt out, this focus fails to recognize that the District Court's ruling was premised on the concepts of *res judicata* and collateral estoppel, which are separate and independent of class certification. If either of those doctrines is applicable, the formalities of class certification are irrelevant.

43 F.3d at 1069.

Because the District Court has jurisdiction, the principal cases cited by Petitioners, *In re Real Estate Title and Settlement Serv. Antitrust Lit.*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 442 (1989) and *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 200 (3d Cir. 1993) are not on point. Petitioners cite *Real Estate Title* for the proposition that a court must have personal jurisdiction over the person it seeks to enjoin, and that a putative class member does not consent to jurisdiction by appearing solely to opt out. *Id.* at 771. The court further stated, however: "Of course, a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has *shown a willingness to engage in extensive litigation in the forum.*" *Id.* at 771 (emphasis added). Petitioners have shown such a "willingness to engage in extensive litigation in the forum" by litigating the certified claims and attempting to collect on their judgment, and have therefore consented to the court's jurisdiction.

Petitioners cite *Carlough* for the proposition that a court does not have jurisdiction over putative class members in the absence of an opportunity to opt out. *Carlough*, however, held that due process is violated where a federal court enjoins an absentee class member "whose minimum contacts with the forum have not been established or, in lieu of minimum contacts, who has not consented to the court's jurisdiction, explicitly or inferentially." *Id.* at 199. The court similarly explained that the right to opt out was a prerequisite to jurisdiction over absent class members *"who otherwise have no affiliation with the forum."*

Id. (emphasis added). Again, *Carlough* supports the exercise of jurisdiction over Petitioners. Petitioners cannot pretend to be strangers to the forum. Their consent to jurisdiction on the certified claims waived any challenge to personal jurisdiction on other claims.

The other points raised by the Petitioners are equally unavailing. Petitioners argue that "virtual representation is not a substitute" for personal jurisdiction. This assertion is irrelevant, because the courts below did not hold that it was a "substitute." Jurisdiction exists because Petitioners voluntarily brought claims before, and obtained a judgment from, the Court. Jurisdiction also exists because Petitioners engaged in a variety of other activities which reflect "purposeful availment" of the benefits of the forum. That other conduct also bears on the existence of virtual representation, but the fact that Petitioners' extensive involvement in this litigation may establish both jurisdiction and virtual representation does not mean that one is a "substitute" for the other.

The Petitioners also argue that the District Court cannot enter an injunction under the relitigation exception to the Anti-Injunction Act without personal jurisdiction. There is no need to address the issue, since personal jurisdiction exists.

Finally, Petitioners argue that the Federal Arbitration Act deprives the District Court of the power to determine whether Petitioners are bound. Petitioners never raised this issue below, and therefore may not obtain review of it in this Court. *U.S. v. Alvarez-Sanchez*, ___ U.S. ___, 114 S.Ct. 1599, 128 L.Ed.2d 319, 329 n.5. (1994). In any case, the argument is meritless. The Federal Arbitration Act

does not bar a court from enjoining arbitrations which are barred by *res judicata*. "Courts should not have to stand by while parties reassert claims [in arbitration] that have already been resolved." *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 600, 126 L.Ed.2d 565 (1993). *Accord*, *In re Y & A Group Securities Litigation*, 38 F.3d 380, 382 (8th Cir. 1994).

In summary, not only is the District Court's holding not in conflict with other authority, it is supported by all relevant authority. Review is therefore inappropriate.

B. THE HOLDING THAT PETITIONERS ARE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT DOES NOT RAISE ANY ISSUE OF GENERAL PUBLIC IMPORTANCE

No issues of general public importance are raised by the holding that Petitioners are subject to the jurisdiction of the District Court. This holding is fact specific. The factual context is both complex and unusual, as reflected by Petitioners' inability to point to cases which conflict with the jurisdictional ruling in this case. Simply stated, the jurisdictional issue is one that is of importance only to the parties to this case. Review, therefore, is inappropriate.

III. REVIEW OF THE SETTLEMENT SUPERVISION ORDER IS INAPPROPRIATE BECAUSE THE ORDER HAS EXPIRED

Petitioners also seek review of the March 24, 1992 Settlement Supervision Order. The Court of Appeals held that any issues relating to that Order were moot. Petitioners do not challenge this holding. Instead they simply ignore it. The failure to address the holding of the Court of Appeals obviously makes review of that holding inappropriate.

In any case, the Court of Appeals was plainly correct. The Order on its face relates solely to communications concerning the proposed settlement. The proposed settlement failed in the Spring of 1992. The Order thus expired more than three years ago, and any issues relating to it are moot. Review of the Settlement Supervision Order is therefore inappropriate.

CONCLUSION

This Court should not review the jurisdictional ruling because review is premature and because the ruling does not conflict with holdings of this Court or any Circuit Court of Appeals and does not raise issues of general public importance. This Court should not review the Settlement Supervision Order because that Order is moot. The petition for certiorari should therefore be denied.

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(5)

Supreme Court, U.S.
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No. 94-1968

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

J. DON ADAMS, et al.,
Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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SUMMARY OF REPLY ARGUMENT

I.

The Petition is ripe for review because it contains issues that are "fundamental to the further conduct of the case." *Land v. Dollar,* 330 U.S. 731, 67 S.Ct. 1009, 91 L. Ed. 1209, 1214, n. 2 (1947).[1] Respondent's Due Process and First Amendment rights are threatened by the scope of remand proceedings directed by the Sixth Circuit, regardless of the district court's ultimate ruling on the existence of virtual representation.

II.

Due process in a class action suit requires compliance with FED. R. CIV. P. 23. The jurisdiction the district court acquired via Rule 23 was limited by the notice to class members of the issues certified against the defendants specified. Accordingly, the district court obtained jurisdiction over Petitioners, as part of the SSG class, solely for the contract claims it asserted against the SSG defendants. The district court certainly did not obtain jurisdiction over Petitioners for any claims beyond those between the SSG class and the SSG Defendants. Significantly, Respondents Merrill Lynch and LeHill Partners[2] were not one of the SSG defendants.

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[1] Overruled on other grounds, *Pennhurst State School & Hosp. v.Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L. Ed. 2d 67 (1984).

[2] Nor were Lehill Partners' predecessors, Dominion Financial Investment Corp. (which changed its name to Trustbank Mortgage Center Inc.).

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ARGUMENT

I. REVIEW IS PROPER BECAUSE RESOLUTION OF THE ISSUES IS FUNDAMENTAL TO THE FURTHER CONDUCT OF THE CASE

Respondents LeHill Partners and Merrill Lynch ("Respondents") oppose the instant Petition for Writ of Certiorari, claiming review is premature because remand to the district court may moot the issues raised in the Petition. The rule against granting certiorari to a case that is not "final" is not absolute or without exception. "[G]iven the extraordinary nature of the writ, the Court should be free to step into the proceedings if the order or judgment of the appellate court, albeit not final, merits review at that time." 12 Moores Fed Practice ¶ 434.01; 6-43. Not only "should" the Court be free to review non-final cases, it has done so and granted certiorari in the absence of a final judgment. *See United States v. The Three Friends*, 166 U.S. 1, 17 S.Ct. 495, 41 L. Ed 897 (1897); *Forsyth v. Hammond*, 166 U.S. 506; 17 S.Ct. 665, 41 L. Ed. 1095 (1897).

The Court will grant certiorari when the Petition contains issues that are "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 736, 67 S.Ct 1009, 91 L. Ed 1209, 1214, n2 (1947). The Court considered an issue "fundamental to the further conduct of the case" when it involved the proper interpretation of a constitutional guarantee, *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L. Ed. 311, 318 (1945); as a result it granted certiorari despite the Circuit Court's remand of the matter to the district court for further consideration. The Court reasoned that review was necessary because the Circuit Court's holding was dependent upon the scope and meaning of the Fifth Amendment of the Constitution. Similarly, review is necessary in the instant case because the viability of the Circuit Court's substitution of "virtual representation" for the actual and contrary notice afforded is dependent upon the scope and meaning of the Due Process clause of the United States Constitution. (See Petition, p 13-21).

Equally important is the Circuit Court's failure to vacate the "Gag Order" and relieve Grady from the threat of pending sanctions for communicating with his clients, vitiating the guarantees afforded under the First Amendment to the U.S.

Constitution. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay Group,* 515 U.S. __, 132 L. Ed. 2d 487, 507, 115 S.Ct. 2338 (1995).

Even as Respondents argue that the constitutional issues under the "Gag Order" are moot, the District Court is poised to sanction Grady for the advice he provided to his clients. This is evidenced by the District Court's repeated (post-Sixth Circuit opinion) references to revisiting the Motions for Sanctions. As noted in the Petition, Petitioners' ability to contest the constitutionality of the "Gag Order" rests solely with this Court. *See Petition,* p 25 and cases cited therein.

Similarly, the Court will accept a Petition for Certiorari, despite the lack of finality, when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.,* 148 U.S. 372, 13 S.Ct. 758, 37 L. Ed. 486, 491 (1893). Granting the instant Petition will not only prevent extraordinary inconvenience and embarrassment, but it will prevent the abrogation of the attorney/client privilege. Even before the return of the mandate from the Sixth Circuit Court of Appeals, the District Court initiated (on its own motion) a discovery period on the issue of whether Petitioners were bound under the doctrine of virtual representation. Respondent Merrill Lynch ("Merrill") issued document subpoenas, not only to "class counsel" Elwood Simon, but to other attorneys who provided independent representation to members of the putative class (which was never certified). As evidenced by the Merrill subpoenas, there is simply no way to conduct meaningful discovery on the issue of virtual representation without impinging on the attorney/client privilege.[3]

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[3] In remanding the case, the Sixth Circuit Court quoted Wright, Miller & Cooper, Federal Practice and Procedure §4457 (1981) with approval in discussing factors which may support a "narrow role" for "virtual representation". "Close nonlitigating relationships with a party, participation, apparent acquiescence and perhaps deliberate maneuvering to avoid the effects of the first action are among the factors to be weighed . . . ." 43 F.3d at 1070. In the instant case, the only non-litigating relationships are through the

Thus, the theory of "virtual representation" has been used both to chill the advice of counsel and to conduct an ex post facto inquisition into the actual advice provided by counsel. These issues will never be more ripe for appellate review.

Merrill's subpoenas seek many documents protected pursuant to the attorney/client and work product privileges including "The 'monthly updates' referenced in Grady's February 21, 1992 memo to his 'Registry Clients.'" "Time records, summaries, billing slips, calendars, diaries or similar documents describing services provided in connection with the investigation or the Litigation by Grady."[4]

The indicia of "virtual representation" discussed in Respondent Merrill's brief emphasize the interference a remand for "fact finding" regarding virtual representation would have upon the attorney/client privilege existing between Petitioners and Thomas Grady. The very indicia cited by Merrill, even if established, would permit a finding of "virtual representation" only by disregarding the attorney/client privilege, FED. R. CIV. P. 23, and Due Process Guarantees.

For example, Merrill argues at p. 4 of its Brief Opposing the Petitioner for Certiorari ("Brief") that the AUO financed Simon's investigation. But what Simon determined is (first of all, properly privileged) that a class action could *not* be filed by the AUO, but must be filed by individual plaintiffs. Indeed, the very notion that individual plaintiffs can file a "class action" is a misnomer on the part of Merrill. Individuals only file individual actions, *inter alia* requesting class certification. When certification is granted (after notice and opportunity to opt out) the action becomes a "class action".

Merrill argues at p. 5 of its Brief that the AUO encouraged individual unit owners to "open direct lines of communication" with class counsel. But that communication would be privileged.

AUO -- of which every unit owner is a member by virtue of his purchase (hence no discovery is required). The others will only be revealed by probing communications with, and the thought processes of, Petitioners' counsel.

[4] Merrill Lynch's document Request to Thomas Grady, 3/13/95, reprinted in Appendix A.